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a period of seven hours, and when he quit work, he had a right to be given his freedom and could not be lawfully detained.

In a recent case in Maine,⁶ on very analogous facts, the court decided, as Lord Justice Vaughan Williams did in the case under consideration. There, the defendant had taken the plaintiff out on a yacht, having promised to take her ashore whenever she desired; but though the plaintiff several times requested the defendant to take her ashore or to furnish her with a boat, the defendant refused so to do. The court held that there was an unlawful detention; and this though the suit was not based upon the defendant's failure to keep his agreement to take the plaintiff ashore, but an action in tort for false imprisonment.

Y. L. S.

PROPERTY—RIGHTS OF UPPER AND LOWER RIPARIAN PROPRIETORS—DIVERSION OF WATER—For the first time in Massachusetts, the precise point whether riparian rights include diversion in reasonable quantities for a proper use on property outside the watershed has been passed upon by the Supreme Court. In an action by a lower riparian owner on a small stream against an upper riparian owner who by means of a pumping apparatus diverted large quantities of water to another estate belonging to it, but not contiguous to the land adjacent to the stream, and also located in a different watershed, it was held that the only question is whether there is actual injury to the lower estate for any present or future reasonable use. The diversion alone without evidence of such damage does not warrant a recovery even of nominal damages.¹

It has been said that the rights of riparian ownership extend only to use upon and in connection with an estate which adjoins the stream and cannot be stretched to include uses reasonable in themselves, but upon and in connection with non-riparian estates.² A riparian proprietor is one whose land is bounded by a natural stream, or through whose land it flows, and riparian rights are those which he has to the use of the water of such stream, and grow out of and depend upon the ownership of such land.³ A difficulty then arises in determining when part of an entire tract of land owned by one person ceases to be riparian. There does not seem to be any rule regulating such a question, and for this reason it seems best not to confine the use to riparian lands and to exclude non-riparian.

In the main, it is true, the use by a riparian owner by virtue of his right as such should be within the watershed of the stream, or

⁶ Whittaker v. Sandford, 85 Atl. Rep. 399 (Me. 1912).

⁷ Stratton v. Mt. Hermon Boys' School, 103 N. E. Rep. 87 (Mass. 1913).

² Lord Cairns in Swindon Water Works Co. v. Wilt and Berks Canal Navigation Co., L. R. 7 H. L. 697, 704, 705 (Eng. 1875).

³ Gould, Waters (3rd Ed.), §148; Kinney, Irrig., §57.

at least, that the current of the stream shall be returned to its original bed before leaving the land of the user.⁴ This is implied in the term "riparian." But this does not mean that the use shall be confined to strictly riparian lands. On the contrary, the courts have frequently held that the extent of the exercise of the use of the water is not to be determined by the area or contour of the land, but by its effect upon other riparian proprietors.⁵ In general, the right of a riparian owner to appropriate the water is limited to his use for such purposes, to such an extent and in such a way as will not be inconsistent with a similar use by the lower owners.⁶ Since the effect upon the lower riparian proprietor is made the test, it would make little difference whether the water was taken for use on riparian or non-riparian lands, just so long as it did not essentially interfere with the exercise of the common right by the other riparian owners. If the use is lawful and beneficial, it must be deemed to be reasonable, and not an infringement of the right of other riparian owners to whom it occasions no actual and perceptible damages either as to the present or future use of the riparian land.⁷ The question in such a case is not whether the diversion being for a legitimate use and in quantity such as is reasonable, having regard to all the circumstances, but only whether it causes actual damage to the person complaining.⁸ Were it otherwise, points out Mr. Chief Justice Shaw in *Elliot v. Fitchburg R. Co.*, and were it an inflexible rule that each lower proprietor has a right to the full and entire flow of the natural stream without diminution, acceleration or retardation of the natural current, it would follow that each lower proprietor would have a right of action against any upper one for taking any portion of the water of the stream for any purpose.

The riparian proprietor's right to appropriate the water for his domestic use and also for watering his cattle is not, however, accord-

⁴ *Kensit v. Great Eastern R. Co.*, L. R. 27 Ch. Div. 122 (Eng. 1884); 3 Kent. Comm. 439, "though the riparian owner may use the water while it runs over his lands, he cannot unreasonably detain it or give it another direction, and he must return it to its ordinary channel when it leaves his estate."

⁵ *Jones v. Conn*, 39 Or. 30 (1901); *Ulbrecht v. Eufawla Water Co.*, 86 Ala. 587 (1888); *Moulton v. Newburyport Water Co.*, 137 Mass. 163 (1884); *Norbury v. Kitchin*, 9 Jur. (N. S.) 132 (Eng. 1863); *Miner v. Gilmour*, 12 Moore, P. C. C. 131 (Eng. 1858), "each proprietor may use the water for any other purpose provided he does not interfere with the rights of other proprietors above or below him."

⁶ 3 Kent. Comm. 439; *Elliot v. Fitchburg R. Co.*, 10 Cush. 191 (Mass. 1852); *Garwood v. N. Y. C. & Hudson R. Co.*, 83 N. Y. 400 (1881); *Mason v. Hill*, 5 Barn. & Adol 1 (Eng. 1833); *Acton v. Blundell*, 12 Mees. & W. 324 (Eng. 1843).

⁷ *Elliot v. Fitchburg*, *supra*; *Kensit v. Great Eastern R. Co.*, *supra*; *White v. Whitney Mfg. Co.*, 60 S. C. 254 (1900); *Baily & Co. v. Clark* (1902), 1 Ch. 649 (Eng.); *Harris v. R. Co.*, 153 N. C. 542 (1910).

⁸ *Fifield v. Spring Valley Waterworks*, 130 Cal. 552 (1900).

ing to the weight of authority, limited by considerations of the necessities of lower proprietors, and he may use the water for these "ordinary" purposes, even though the effect be to exhaust the supply.⁹ On the other hand, his right to appropriate the water for what are considered "extraordinary" uses, such as manufacturing, irrigation, and others, is restricted by the requirement that such appropriation must not so diminish the flow of water as to materially injure other proprietors lower down,¹⁰ or, as stated by others, his use of the water must not be unreasonable, having regard to a like use by the lower proprietor.

There are numerous decisions to the effect that the rights of a riparian proprietor do not extend to uses on land outside the watershed. In such cases, however, the fact appears that actual damages were caused by the diversion.¹¹ In *Paterson v. East Jersey Water Co.*¹² it was held that the uses of water of a flowing stream must, in order to be reasonable, be consistent with the occupation and enjoyment of the riparian lands; and, where a water company diverts such a perceptible quantity as to exclude the application of the maxim, "*De minimis non curat lex*," and such water is used to supply its customers, some of whom are located in a different watershed, such use is unreasonable and entitles a lower riparian owner to relief by injunction without proof of actual damage. Here, however, the court said the continuance of such diversion may ripen into a right of appropriation by prescription.

In reason, there seems to be no distinction between diversion of water from a stream for use in the locomotive engines of a railroad, which of necessity consume the water by evaporation on their journeys without perceptible return to any stream, and the diversion of water for any other legitimate use outside the watershed and upon non-riparian land. Whether such a use for locomotive engines is within the rights of riparian ownership has been the subject of somewhat variant conclusions as to the fact of reasonableness. A corporation with the right of eminent domain, which takes the water of a stream for its corporate uses, not by exercise of its right as such, but by virtue of its rights as riparian owner, has no other or higher rights in the water than an ordinary riparian owner.¹³ Sometimes the size and capacity of a stream has an im-

⁹ Gould, Waters, §205; Spence v. McDonough, 77 Iowa, 460 (1889); Anthony v. Lapham, 5 Pick. 175 (Mass. 1827).

¹⁰ Embrey v. Owen, 6 Exch. 353 (Eng. 1851); Wheatley v. Chrisman, 24 Pa. 298 (1855); Gould v. Stafford, 77 Cal. 66 (1888); Anderson v. Cincinnati So. R. Co., 86 Ky. 44 (1887).

¹¹ Williams v. Wadsworth, 51 Conn. 277 (1883); Bathgate v. Irvine, 126 Cal. 135 (1899).

¹² 74 N. J. Eq. 49 (1908); affirmed 77 N. J. Eq. 588 (1910).

¹³ McCartney v. Londonderry & Lough Swilly R. Co. (1904), A. C. 301 (Eng.); Garwood v. N. Y. C. & Hudson R. Co., *supra*; P. R. R. v. Miller, 112 Pa. 34 (1886).

portant bearing upon questions of this nature,¹⁴ which are to a considerable extent questions of degree, depending for determination upon the circumstances of each particular case. Sometimes the law will say what is a reasonable use. Thus they hold in New Jersey, that the sale of a right to take water for use on non-riparian lands is unreasonable as a matter of law, if thereby another riparian proprietor sustains palpable damage.¹⁵ However, it is the general rule that the question of reasonableness is one of fact and for the jury to determine from all the circumstances.¹⁶

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¹⁴ *Wheatley v. Chrisman*, *supra*, note 10.

¹⁵ *Higgins v. Flemington Water Co.*, 36 N. J. Eq. 538 (1883).

¹⁶ *Norbury v. Kitchin*, 9 Jur. (N. S.) 132 (Eng. 1863); *Gillis v. Chase*, 67 N. H. 161 (1891); *Hetrich v. Deachler*, 6 Pa. 32 (1847).